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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1190

KEVIN H. WHITE,
as he is Mayor of the City of Boston, et al.,
Petitioners,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CITY OF BOSTON PRINTING SECTION

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IN THE

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No. ———

KEVIN H. WHITE,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Kevin H. White, as he is Mayor of the City of Boston, Massachusetts, Edward T. Sullivan and Barbara G. Cameron, as they are Public Facilities Commissioners of the City of Boston, and Robert J. Vey, as he is the Director of Public Facilities of the City of Boston, hereinafter referred to as "the City Petitioners", respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this matter on December 19, 1974.

OPINIONS BELOW

The December 19, 1974, opinion of the United States Court of Appeals for the First Circuit, as yet unreported, is reprinted as Appendix A to the Petition for Writ of Certiorari being filed by the Boston School Committee, at pages 1 to 34. The June 21, 1974, opinion of the United States District Court for the District of Massachusetts, reported at 379 F. Supp. 410 (D. Mass. 1974), is reprinted as Appendix C to the Boston School Committee's Petition, at pages 36 to 173.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction in the District Court was found under 28 U.S.C. §1343(3).

The City Petitioners were parties to the District Court proceedings prior to the judgment and opinion of the Court of Appeals. City Petitioners Sullivan, Cameron, and Vey were made additional parties defendant by oral order entered by the District Court on September 6, 1974, as to the issue of school construction. Mayor White was named an additional party defendant by order of the District Court, entered September 30, 1974 (a copy of which is reprinted as Appendix A to this Petition), as to issues concerning public safety, security, and financial aspects of implementation of desegregation.

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct by holding as a matter of law that *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), requires the Boston School Committee to make a positive showing of integrative intent in order to rebut the presumption relied upon by the District Court that segregative intent exists throughout the entire Boston Public School system?

2. Whether the presumption established in *Keyes* v. *School Dist. No. 1* which allows a District Court to characterize a school system as a totally segregated "dual" system upon a finding of segregative activity affecting only a part of that system has been abrogated by the rule stated in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), that a remedy in a school desegregation case must not exceed the scope of proven Constitutional violations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Plaintiffs below (hereinafter Plaintiffs) brought this action on March 25, 1972, against the Boston School Committee, its individual members, and the Superintendent of the Boston

Public Schools (hereinafter the School Committee), and against the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education of the Commonwealth of Massachusetts, seeking declaratory and injunctive relief against alleged racial discrimination in the operation of the Boston Public Schools. Plaintiffs, who were later certified as proper representatives of a class of all black children enrolled in the Boston Public Schools and their parents, sought relief for alleged violations of the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§1981, 1983, and 2000d.

The School Committee generally denied Plaintiffs' allegations, arguing that the uneven proportions of blacks and whites in the schools were due to residential settlement patterns and the policy of providing neighborhood schools.

On June 21, 1974, the District Court (Garrity, J.) found that "defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system." (App. C, p. 170.) The District Court relied upon the presumption established in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), that a school system which is substantially and intentionally segregated is a completely dual system, and is thereby subject to complete dismantling, "root and branch," as prescribed in *Green* v. *County School Board*, 391 U.S. 430, 438 (1968).

The District Court's Partial Judgment enjoined the School Committee "from discriminating on the basis of race in the operation of the public schools of the City of Boston" and ordered the School Committee "to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston,

including all consequences and vestiges of segregation previously practiced by the defendants." (App. D, pp. 174–175.) Further, by Interlocutory Order the District Court enjoined the School Committee from "failing to comply in any respect with the Racial Imbalance Plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974. . . ." (App. D, p. 175.)[1]

The District Court also enjoined the construction of any new school or expansion or the placement of any new portable school, the transfer of white teachers from schools with majority black enrollments or the transfer of black teachers from schools with majority white enrollments, and the granting of any student transfers under exceptions to the controlled transfer policy. (App. D, p. 175.)

The School Committee appealed to the United States Court of Appeals for the First Circuit. On December 19, 1974, the Court of Appeals issued its decision (App. A, pp. 1–34) and Judgment (App. B, p. 35) which affirmed the Judgment of the District Court. The Court of Appeals upheld the findings of substantial segregation with intent in five areas of the school system: (1) facilities utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; and (5) faculty and staff hiring and assignments. (App. A, pp. 10–23, 27–33.) In the sixth area, vocational and examination schools, the Court of Appeals upheld the finding of segregation in those schools and applied the *Keyes* presumption that where a substantial

[1]The Supreme Judicial Court-ordered plan was the result of litigation between the State Board of Education and the School Committee in Massachusetts state courts with respect to the state's efforts to force the School Committee to comply with the Massachusetts Racial Imbalance Law, St. 1965, c. 641, as amended. (App. C, pp. 44–48.)

portion of a school system is intentionally segregated and another part is found to be segregated, intent will be presumed with respect to the latter part. (App. A, pp. 23–27.)

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because The Court Of Appeals Has Wrongly Interpreted This Court's Decision In *Keyes* v. *School Dist. No. 1* So That Rebuttal Of The Presumption Of Segregative Intent Can Be Achieved Only By A Positive Showing Of Integrative Intent.

The Court of Appeals erred in establishing an excessively strict burden of proof to rebut the presumption of segregative intent with respect to the examination and vocational schools in Boston. (App. A, pp. 23–27.) The Court of Appeals apparently relied upon the language of this Court in *Keyes* that "where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts." 413 U.S. 189, 210.

The Court of Appeals erroneously modified that presumption when it said that "little short of a positive showing that defendants acted with *integrative* intent would suffice to rebut the presumption of segregative intent." (App. A, p. 26, n. 21.) The City Petitioners urge that this is a significant and unwarranted extension of the *Keyes* presumption.

The Court of Appeals held the School Committee to that burden with respect to the examination and vocational schools, despite the showing at the trial that substantial modifications had been made for admission to the examination schools and that admission to the vocational schools was voluntary. The

changes in the selection system to the examination schools came with a 1972 consent decree between the Massachusetts Commission Against Discrimination and the School Committee, which provided that future admissions be based solely upon Secondary School Admission Tests (SSAT) administered by the Educational Testing Service (ETS) and an allocation of 112 seats annually to underrepresented districts. (See App. C, pp. 141–42.) The District Court made no finding that this new system resulted in or was leading to segregation. Further, the School Committee had retained ETS to evaluate the use of the nationally used SSAT for possible segregationist effect, as was shown with a different test in *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

The presumption is especially inappropriate in this case where the isolation of the examination and vocational schools is not geographical, as it was for the Park Hill schools in *Keyes*, but is structural and organizational. The examination and vocational schools, because of their different programs and student admissions policies, are as different from the rest of the Boston Public School system as a private school is from a public school. "[The examination schools] offer excellent college preparatory instruction and their graduates matriculate at the nation's finest colleges and universities. . . ." (App. C, p. 139.) The presumption, as applied to Boston by the Court of Appeals, makes even less sense than when applied to geographically isolated parts of a school system.

The City Petitioners recognize that even if the findings of segregation in the examination schools were in error, precedent from this Court indicates a strong unwillingness to overturn findings of fact by lower courts. *E.g.*, *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948). We assert, however, that the evidence of changed procedure agreed

to by the state commission against discrimination meets the burden of proof required by *Keyes* to rebut the presumption of segregative intent.

Moreover, the burden of "little short of . . . integrative intent" is almost impossible to meet in any real situation, and especially in a large city such as Boston with its many ethnic neighborhoods. (See the map of the City of Boston, Appendix B to this Petition.) The Court of Appeals standard demands behavior not mandated by the Fourteenth Amendment and illustrates the danger foreseen by Mr. Justice Rehnquist in his dissenting opinion in *Keyes*, who stated:

> "To require that a genuinely 'dual' system be disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else." 413 U.S. 189, 258.

In explicitly imposing a duty to integrate, where *Keyes* only established a burden to show absence of segregative intent, the Court of Appeals has imposed, in practical effect, an irrebuttable presumption of segregative intent where segregation is found in any part of a system which contains some evidence of intentional segregation. Irrebuttable presumptions are disfavored by this Court. *See Vlandis* v. *Kline*, 412 U.S. 441, 446–48 (1973). Such a presumption puts the courts in the position of requiring conduct which is not required by the Constitution, and in so doing the courts exceed the judicial powers conferred upon them under Article III of the Constitution.

In substantially expanding the *Keyes* presumption, the Court of Appeals has decided an important federal question in conflict with this Court's conclusion in *Keyes*.

II. Certiorari Should Be Granted In Order That This Court Can Reconcile Its Decisions In *Keyes* v. *School Dist. No. 1* And *Milliken* v. *Bradley* As To The Extent To Which The Presumption Of A Dual School System Can Be Utilized In A Single School System Case.

The doctrines announced by this Court in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973), and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), if left unreconciled, suggest that a double standard is being imposed for proof of unconstitutional segregative activity with respect to schools. If the defendant is a single school system, as in *Keyes*, plaintiff need only prove segregative activity with respect to a substantial part of that system in order to have the entire system characterized as "dual." The characterization of a school system as "dual" subjects each and every school within that system to the gamut of remedial measures available to the district court. However, if the defendant is a metropolitan region containing several school systems, as in *Milliken*, the plaintiff must show, unaided by the presumption announced in *Keyes*, actual segregative activity in a particular part of the metropolitan region before that part may be required to participate in the desegregation remedy.

The Court has justified the presumption established in *Keyes* by noting that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are subjects of those actions." *Keyes*, *supra* at 203. It would seem to be just as much a part of common sense that racially-inspired actions with respect to central city schools have an impact beyond the central city and contribute to the racial identifiability of suburban schools. Yet the Court, in *Milliken*, refrained from utilizing such a presumption, thereby suggesting that the mere

presumptive implication of certain schools or parts of an area does not justify extension of equitable corrective measures to such parts or schools. In short, the Court has suggested either that the *Keyes* presumption has been abrogated, or that municipal boundaries are more important than the Constitution of the United States.

If the *Keyes* presumption has survived *Milliken*, its application only to single school systems, especially to a school system so bizarre geographically as Boston's, appears inequitable. Parts of Boston are separated by many miles and bodies of water from the area of the City of minority concentration. Such neighborhoods would be unlikely, even given a purely neutral and natural pattern of ethnic group dispersion, to have a significant minority population. Yet, merely because such neighborhoods are part of the same jurisdiction, they must participate fully in the desegregation remedy, because the entire system has been characterized as "dual" by application of the *Keyes* presumption.

On the other hand, certain suburban municipalities much closer than parts of the City to the area of minority concentration, have virtually all-white populations, contrary to what could be expected given a purely neutral and natural pattern of ethnic group dispersion. Yet these municipalities are immune from any participation in the desegregation remedy, because this Court recognizes no presumption strong enough to enable the District Court to leap across municipal boundaries as it did to enable the District Court to leap across miles of city space and bodies of water within the City.

Such disparate treatment of neighborhoods in the central city and neighborhoods in abutting suburbs is perceived by those who must adjust to the necessity of desegregation as grossly unfair. This Court, as the highest court of equity,

should address this problem and thereby assist in the vindication of Constitutional rights, a goal which can be attained ultimately only by popular acceptance of the Constitutional mandate of equal educational opportunity for all, and not by mere juxtaposition of peoples of different races. Popular acceptance is impeded, if not precluded, as long as the people perceive — whether correctly or not — that this Court has utilized a double standard of justice when dealing with city and suburban neighborhoods. In short, this Court should reconcile *Keyes* and *Milliken* by announcing a uniform standard for proving liability for unconstitutional segregative activity with respect to schools.

CONCLUSION

The City Petitioners have a compelling interest in a precise determination of the violation of law because of the implications this issue has for the final determination of the remedy in the District Court proceedings. This Court has often stated that "the nature of the violation determines the scope of the remedy." *E.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The City Petitioners urge that since the "federal remedial power may be exercised 'only on the basis of a constitutional violation' ", *Milliken*, *supra* at 738, again quoting *Swann*, *supra* at 16, the District Court should restrict the scope of its remedies to the point of actual findings of constitutional violations rather than presumed findings.

This Court has observed that the "reconciliation of competing values in a desegregation case is, of course, a difficult task. . . ." *Swann*, *supra* at 31. That reconciliation becomes more difficult when parts of a school system not involved in the violation are forced to comply with the remedy.

Although the question of remedy is not yet precisely before this Court, the City Petitioners are concerned that without a decision of this Court as to the nature of the violation, others might later argue that the issue as to liability raised in this Petition would be foreclosed when that remedy stage comes. Therefore, we urge that the nature of the violation be more explicitly stated now in view of the high fiscal, educational, and public safety burdens of the expected remedy.

Accordingly, a Writ of Certiorari should issue to the Court of Appeals in this case because of the substantial importance of this controversy to the citizens of Boston and other cities, and because the decision of the Court of Appeals is in conflict with the previous holdings of this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN ET AL.,
PLAINTIFFS
v.
JOHN KERRIGAN ET AL.,
DEFENDANTS
} Civil Action No. 72-911-G

ORDER JOINING KEVIN H. WHITE, AS HE IS MAYOR, AS A PARTY DEFENDANT

September 30, 1974

GARRITY, J. After hearing, the motion of the city defendants to join Kevin H. White, as he is Mayor of the City of Boston, as a party defendant is granted for certain specific purposes, as follows:

1. The Mayor will be joined as a party defendant as to issues concerning the safety and security of the people of the City of Boston as they are affected by the implementation of the court's desegregation order. In this connection the Mayor's responsibility for the police department and other related services and departments needed to effect peaceful implementation of the court's order makes joinder desirable and probably essential to effect complete relief to all the parties.

2. The Mayor will be joined as a party defendant as to issues concerning the financial aspects of implementation of desegregation. The Mayor's control of the financial departments involved in funding of implementation of the court's orders makes joinder desirable and probably essential to afford complete relief to all the parties.

3. With respect to other aspects of the court's order, including proposals relating to long-range desegregation plans, the primary responsibility of the City of Boston for these matters is placed with the original city defendants, the Boston School Committee and Superintendent. Therefore, the court will entertain such proposals from the Mayor only after they have been presented to the school committee. If, after reasonable opportunity for consideration by the school committee, the school committee does not adopt such proposals or present them to this court through its counsel, the court will on application hear any such proposals or other motions from the Mayor.

4. As appropriate, the court retains the power to add to or modify the provisions of this order.

(s) W. ARTHUR GARRITY, JR.
United States District Judge.